No. 12880

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GUY F. ATKINSON CO., A CORPORATION, AND J. A. JONES CONSTRUCTION CO., A CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The tenor of respondent's argument under Point I of its brief (pp. 10–34) is, in substance, not that the Board has erroneously interpreted the controlling provisions of the Act but that the Board's application of these provisions to the instant case is "unrealistic" and "unworkable" because of the character of employment relations in the building construction industry. But, as both the Board (see p. V of appendix to respondent's brief) and the Supreme Court have pointed out, it is neither within the province of the Board nor of the courts to vary or nullify the legislative purpose as reflected in the statute no matter how compelling practical considerations might make that course. As the Supreme Court stated in *Colgate-*

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Palmolive Peet Co. v. *N. L. R. B.*, 338 U. S. 355, at p. 363:

> It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy * * * To sustain the Board's contention [here respondent's contention] would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.

As we have pointed out in our main brief, Congress enacted no qualification, and insofar as the Act or its legislative history discloses, intended none, to the requirement of the proviso in Section 3 of the original Act based upon the employment relations in the construction industry or any other. Respondent's argument should appropriately be addressed only to Congress and not the Board or the courts.

Indeed, Senator Taft, co-author of the amended Act, recently took note of the considerations similar to those urged here and has introduced a proposed amendment to the Act (S. 1959, 82d Cong.; 1st sess.) exempting the construction industry from requirements such as that applied here by the Board so that "an agreement may be made by contractors with a building trades [union] before the initiation of a job and before, therefore, there are any employees who can vote to make any particular union a representative of those employees." 93 Cong. Daily Rec. 9888. But until Congress has acted in accordance with Senator Taft's proposal, the statute must be construed as it reads, without any distinction upon the basis here

urged by Respondent. That, in fact, is the essence of the Supreme Court's holding in the *Colgate-Palmolive-Peet* case, *supra.*

2. Respondent asserts under Point II of its argument (pp. 34–44) that the Board's decision in the instant case represents a denial of due process because it retroactively imposes sanctions upon respondent for action taken in reliance upon the Board's former policy of abstaining from asserting jurisdiction over the construction industry. Because of that policy, respondent asserts, it and the union had the *right* to enter into the agreement of August 16, 1947, and both parties had the *right* to terminate Hewes' employment on the basis of that contract. This contention is manifestly without merit. The contention presupposes that action taken by employers or unions is lawful if the Board declines to assert jurisdiction over the parties and thereby refrains from enforcing the Act with respect to these parties, even though, as here, that abstention is based upon administrative choice and not upon legal necessity. Plainly, abstention based upon such considerations does not confer a *right* upon the parties to do what the Act declares to be illegal nor can that abstention be converted into affirmative approval or validation of action otherwise violative of the Act. The case therefore presents no retroactive nullification of "rights." *N. L. R. B.* v. *Baltimore Transit Co.,* 140 F. 2d 51, 55 (C. A. 4), certiorari denied, 321 U. S. 795; *Local Union 12* v. *N. L. R. B.,* 189 F. 2d 1, 5 (C. A. 5). This Court rejected a similar contention in *N. L. R. B.* v. *Townsend,* 185 F. 2d 378, 383.

circumstances there is in the instant case a total absence of the equitable considerations which prompted the Board to dismiss the complaint in the *Braukman* case. In the *Kenny* case, *supra*, the Board dismissed the complaint against an employer because the contract which formed the basis thereof had been previously adjudicated to be lawful by the New York State Labor Board which had asserted jurisdiction in the matter pursuant to the then existing agreement between it and the National Board. The Board, out of considerations of equity and comity, concluded that the employer should not be penalized under the Act for acting on the basis of a contract previously determined to be lawful by a state agency which had full authority to act in the matter. The instant case plainly presents no comparable situation.

Respectfully submitted.

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